Kentucky Law Journal

Volume 104 | Issue 2 Article 3

2016

Governmental Acquiescence in Private Party Searches: The State Action Inquiry and Lessons From the Federal Circuits

Eugene L. Shapiro
Cecil C. Humphreys School of Law, The University of Memphis

Governmental Acquiescence in Private Party Searches: The State Action Inquiry and Lessons From the Federal Circuits

Eugene L. Shapiro[1]

ABSTRACT

In an area characterized by a significant potential for governmental abuse, judicial examination of whether governmental acquiescence in a specific private party search constitutes state action, consequently subject to Fourth Amendment constraints, has often lacked appropriate focus and depth. An examination of the standards used among the federal circuits reveals prevalent approaches which identify the circumstances bearing upon the matter, but which address them under "multi-factored" totality of the circumstances standards. The result has too often been a lack of specificity in discussing the issues and a failure to provide needed clarity for law enforcement.

This article examines the analyses among the circuits. It then suggests a restructured inquiry that employs a rebuttable presumption that evidence should be suppressed if there has been sufficient police encouragement to search. Consistent with state action analysis in other contexts, the suggested approach would emphasize the importance of a central focus upon the nature of the governmental encouragement. It would also retain past productive judicial observations concerning the countervailing significance of independent private motivations, facilitate a detailed examination of the relevant issues, and address other shortcomings of the current approaches.

INTRODUCTION

Seldom has the need for clarity in delineating the contours of state action—"the dividing line between the public sector, which is controlled by the Constitution,

---

[1] Professor of Law, Cecil C. Humphreys School of Law, The University of Memphis. The author wishes to thank Johannah O'Malley and C. Benjamin Lewis for their assistance during the preparation of this article.

and the private sector, which is not"[2]—seemed more evident than in the area of search and seizure. In *Skinner v. Railway Labor Executives' Ass'n*,[3] the Supreme Court affirmed the familiar principle that "[a]lthough the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government."[4] In light of the critical nature of this threshold issue and the enormous potential for abusive governmental instigation of private searches, one would anticipate that appellate courts would be able to develop sufficiently focused standards for determining whether governmental encouragement of a private party search requires a finding of state action. The Supreme Court has offered its view of the appropriate inquiry. In *Skinner*, the Court continued, "Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved 'in light of all the circumstances.'"[5] The Court thus called for a focus upon the nature and extent of the governmental activity, necessarily informed by the context within which it occurs.

This examination of the extent of the government's involvement, which implicitly regarded as inapplicable that strand of state action analysis which could find that a "public function" performed by a private party, may be subject to constitutional constraints. It is reasonable to conclude that this approach in the area of search and seizure has been foreclosed by the Court's requirement in *Jackson v. Metropolitan Edison Co.*,[6] that under this doctrine only the exercise by a private party of "powers *traditionally exclusively* reserved to the State"[7] would result in constitutional applicability.[8] Thus, to use the phrase in *Skinner*, an examination of

---

[2] Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U.L. REV. 503, 504 (1985).

[3] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602 (1989).

[4] *Id.* at 614; *see also* United States v. Jacobsen, 466 U.S. 109, 113–14 (1984) ("This Court has . . . consistently construed this protection as proscribing only governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government official.'" (quoting Walter v. United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting))).

[5] *Skinner*, 489 U.S. at 614 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971)) (citations omitted).

[6] Jackson v. Metro. Edison Co., 419 U.S. 345 (1974).

[7] *Id.* at 352 (emphasis added).

[8] The application of public function analysis to specific categories of private actors has, however, at times been urged in the literature. *See* John M. Burkoff, *Not So Private Searches and the Constitution*, 66 CORNELL L. REV. 627, 657 (1981) (arguing that private police who engage in searches are often "cloaked with the authority of the state" by virtue of their licenses, badges, and uniforms); Jim Michael Hansen, *The Professional Bondsman: A State Action Analysis*, 30 CLEV. ST. L. REV. 595, 596 (1981) (examining "whether section 1983 claims are cognizable against bondsmen and their agents"); Adalgiza A. Nùñez, Note, *Civilian Border Patrols: Activists, Vigilantes, or Agents of the Government?*, 60 RUTGERS L. REV. 797, 798 (2008) (arguing that "civilian border patrol groups . . . are absorbing responsibilities that are exclusively reserved for the federal government").

the "degree . . . of the Government's participation" in a private search falls within the realm of the Court's state action analysis, which looks to the state's actual involvement.[9]

To the extent that the area of search and seizure requires clarity in providing guidelines to law enforcement personnel,[10] the judicial analysis of governmental involvement in private searches should be structured so that conceptions of improper practices occupy center stage. Unfortunately, an examination of the standards articulated among the federal courts of appeal reveals that efforts to consider potential circumstances that can bear upon a search have developed into prevalent "multi-factored" approaches, which have often failed to retain the primacy of an examination of the state's actions.[11] These totality of the circumstances approaches in fact often provide a disincentive to focus upon the nature and significance of governmental action in sufficient detail. Holdings have at times rested upon a congruence of factors, seemingly providing insufficient guidance for consistent judicial implementation of policy at the trial level. These insufficiently guided lower court conclusions are frequently affirmed under a deferential standard of review,[12] and, perhaps most importantly, the multi-factored

---

[9] *Skinner*, 489 U.S. at 614 ("Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities."). While the examination of state action in the area of private party searches has this focus, in other contexts there has been a tremendous amount of variation concerning the nature of the state activity required. *See, e.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622 (1991) (holding that in a civil action, a private litigant's decision to exercise peremptory challenges to exclude jurors on the basis of race did constitute state action because of "significant participation of the government" in maintaining the peremptory challenge system); *Jackson*, 419 U.S. at 357 (explaining that state's approval of utility's requested procedure for terminating service for nonpayment was insufficient because the regulating Commission "ha[d] not put its own weight on the side of the proposed practice by ordering it"); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177–79 (1972) (holding that granting a liquor license to a racially discriminatory private club was insufficient government involvement); Burton v. Wilmington Parking Auth., 365 U.S. 715, 724–25 (1961) (holding that a financially interdependent "symbiotic relationship" between the Parking Authority and a racially discriminating tenant coffee shop was sufficient to establish state action).

Indeed, it has long been asserted by many commentators that the Court's application of the doctrine has lacked consistency. *See* Chemerinsky, *supra* note 2, at 505 ("For twenty years, scholars persuasively argued that the concept of state action never could be rationally or consistently applied.").

[10] *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) ("Courts attempting to strike a reasonable Fourth Amendment balance . . . credit the government's side with an essential interest in readily administrable rules."); Illinois v. Andreas, 463 U.S. 765, 772 (1983) (stating that a Fourth Amendment standard "should be workable for application by rank-and-file, trained police officers.").

[11] *See, e,g,*, United States v. Walther, 652 F.2d 788 (9th Cir. 1981); United States v. Steiger, 318 F.3d 1039 (11th Cir.).

[12] *See, e.g.*, United States v. Silva, 554 F.3d 13, 19 (1st Cir. 2009) ("Although Silva makes multiple arguments about inferences the lower court could have drawn from the evidence, he has failed to shown [sic] the court's conclusions were clearly erroneous."); United States v. Feffer, 831 F.2d 734, 739 (7th Cir. 1987) ("We will disturb the district court's findings of fact only if clearly erroneous."); United States

approach provides an unnecessary reduction in clarity for law enforcement. Insofar as deliberate police misconduct is concerned, this consequence could only have the effect of increasing the frequency of improper governmental instigation of searches which are believed by the police to be constitutionally immunized. Among these, one abusive practice that certainly warrants its own attention is the problem of the proverbial "wink and a nod," in which police make an explicit reference to a private party concerning his or her ability to search free of constitutional constraints.[13]

It is the thesis of this article that the provision of sufficient notice to law enforcement concerning the parameters of impermissible police instigation and encouragement should constitute a principal value to be served by judicial analysis, and that the prevalence among the circuits of a multi-factored, totality of the circumstances approach is neither necessary nor sufficiently instructive. This commentary will begin by attempting to advance the discussion in the area by taking a closer look at the analyses by the federal circuits and by exploring the considerations that the courts of appeal have highlighted. It will then suggest a more appropriate structuring of judicial analysis, which will emphasize the significance of an examination of the state's activity. Finally, it will set forth the author's view as to why the suggested, more structured inquiry is consistent with settled state action doctrine and beneficial in avoiding some of the problems presented by the circuits' prevalent totality of the circumstances approach.

I. THE APPROACHES AMONG THE CIRCUITS

In the 1981 decision of *United States v. Walther*,[14] the Court of Appeals for the Ninth Circuit approached the issue of governmental responsibility for private party searches with a methodology that has served as the foundation for the analysis in a large majority of the federal circuits. While many of *Walther*'s observations have been refined or modified by its progeny over the years, its basic analysis, emphasizing the examination of common yet non-exclusive "factors" bearing upon the issue, has widely commended itself to other courts of appeal.

In *Walther*, a Western Airlines employee, Hank Rivard, while working in the baggage terminal, observed a woman's overnight case that had been shipped as a "Speed Pak."[15] Rivard shook the case and found it to be suspicious because it was light, did not rattle, and was taped shut.[16] Upon opening the case, Rivard "found that it contained a white powder substance."[17] Rivard contacted an agent of the

---

v. Lambert, 771 F.2d 83, 89 (6th Cir. 1985) ("The district court's evidentiary rulings must be upheld on appeal unless they are clearly erroneous.").

[13] For a judicial recognition of this sort of abusive practice, see United States v. Jarrett, 338 F.3d 339, 343 (4th Cir. 2003).

[14] United States v. Walther, 652 F.2d 788 (9th Cir. 1981).

[15] *Id.* at 790.

[16] *Id.*

[17] *Id.*

Drug Enforcement Administration (DEA), who confirmed after a field test that the substance was cocaine.[18] The cocaine was replaced with sugar, the package was resealed, and when Walther arrived to claim it she was arrested in the parking garage.[19] The arrest led to the seizure of other evidence from her purse and car,[20] and she and the package shipper were charged with possession of cocaine and other offenses.[21]

The events surrounding Rivard's contact with Walther's case were "not Rivard's first contact with the DEA."[22] He had been a DEA confidential informant between 1973 and 1977.[23] Rivard had been given an informant number, and was paid principally for information concerning individuals fitting a "drug profile" on at least eleven occasions.[24] While his informant's file had been closed in 1979 when he was on leave from the airline, Rivard had not been informed of that fact.[25] At Walther's suppression hearing, Rivard testified that he had discovered illegal drugs in Speed Paks in the past.[26] "[T]he DEA had never discouraged him" from opening such packages, and he also testified that while he did not expect payment for notifying the DEA of the contents of Walther's case, he also had no reason not to expect it.[27] A DEA agent testified that Rivard would have been paid had he discovered a "significant amount of drugs."[28]

"[T]he district court found that at the time Rivard opened the Speed Pak, he was acting as 'an instrument or agent' of the DEA."[29] It also "found that in opening the Speed Pak Rivard was not carrying out a business purpose of his employer, his sole reason being his suspicion that the case contained illegal drugs."[30] It concluded that it was probable that Rivard opened the case with the expectation of compensation if a significant quantity of drugs was discovered, and suppressed all evidence obtained as a result of the search.[31]

---

[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 791.
[30] *Id.*
[31] *Id.* On the same basis, the evidence was suppressed in the shipper's case, and the appeals were consolidated. *Id.*

The Ninth Circuit found that the district court's ruling was proper. It noted that "where a private party acts as an 'instrument or agent' of the state in effecting a search or seizure, fourth amendment interests are implicated."[32]

> This court has recognized that there exists a "gray area" between the extremes of overt governmental participation in a search and the complete absence of such participation. The resolution of cases falling within the "gray area" can best be resolved on a case-by-case basis with the consistent application of certain general principles.[33]

The Ninth Circuit noted that de minimus or incidental contact between a citizen and law enforcement is insufficient to transform a private citizen into a state agent, and stated that "[t]he government must be involved either directly as a participant or indirectly as an encourager of the private citizen's actions . . . ."[34] The court added that "[t]he requisite degree of governmental participation involves some degree of knowledge and acquiescence in the search."[35] Citing cases where a telephone company had statutory authorization to monitor its own lines for unauthorized use and where a bank had been required to report crime, the court further observed that "[m]ere governmental authorization of a particular type of private search in the absence of more active participation or encouragement [would be] similarly insufficient" to implicate the Fourth Amendment.[36]

The court stated that a private party's "legitimate independent motivation for conducting the search" was significant, especially where "law enforcement officers . . . do not take an active role in encouraging or assisting an otherwise private party search."[37] It added,

> It is clear from the foregoing that two of the critical factors in the "instrument or agent" analysis are: (1) the government's knowledge and acquiescence, and (2) the intent of the party performing the search. These are the factors which have generated most of the controversy on this appeal and which now occupy our attention.[38]

---

[32] *Id.*

[33] *Id.* (citation omitted).

[34] *Id.*

[35] *Id.* at 792. The court also noted that a wide variety of situations involving these principles existed, observing that, as an example, a federal anti-hijacking program might be considered a governmental search if an airline employee's activity fell within the federal guidelines. *Id.*

[36] *Id.* (citing United States v. Goldstein, 532 F.2d 1305 (9th Cir. 1976); United States v. Stevens, 601 F.2d 1075 (9th Cir. 1979)).

[37] *Id.*

[38] *Id.*

With regard to the standard of review of the district court's findings, the court stated that the ruling below was "proper under any standard."[39] It added that Rivard had stated "that the only reason why he opened the case was his suspicion that it contained illegal drugs. Thus, legitimate business considerations such as prevention of fraudulent loss claims were not a factor."[40] He had an expectation of probable reward, and thus had "the requisite mental state of an 'instrument or agent.'"[41]

The court also saw proof of the government's acquiescence in the DEA's prior contact with Rivard. While the government had no previous knowledge of this specific examination and had not "directly" encouraged it, it had "certainly encouraged [him] to engage in this type of search."[42] He had opened such packages before, and "[t]he DEA thus had knowledge of a particular pattern of search activity dealing with a specific category of cargo, and had acquiesced in such activity."[43] In its conclusion, the court "emphasize[d] the narrowness" of its holding.[44] "We merely hold that the government cannot knowingly acquiesce in and encourage directly or indirectly a private citizen to engage in activity which it is prohibited from pursuing where that citizen has no motivation other than the expectation of reward for his or her efforts."[45]

Most of the circuits employing a multi-factored approach use the two specific "critical factors" identified by the *Walther* court as a starting point for their discussion. Although after *Walther* the Ninth Circuit did not immediately revisit the issue of a private party's independent business motivation, it soon continued to examine the general question of a private party's purpose. In *United States v. Miller*,[46] decided less than two years after *Walther*, the Ninth Circuit concluded that under *Walther*'s approach, the victim of a theft was a private actor after he entered upon the defendant's land "out of a desire to recover his stolen property."[47] The court reached this conclusion despite the government's express concession that it "knew of and acquiesced in [the victim's] conduct."[48] The victim, Nandor Szombathy, who lived in Spokane, Washington, had received an anonymous tip that his stolen low-boy trailer and three conveyor belts were on defendant's

---

[39] *Id.* at 791.
[40] *Id.* at 792.
[41] *See id.*
[42] *Id.* at 793.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] United States v. Miller, 688 F.2d 652 (9th Cir. 1982).
[47] *Id.* at 657.
[48] *Id.*

property in Superior, Montana.[49] He notified the FBI, who in turn advised the local sheriff's office in Superior.[50] A deputy confirmed that Miller had "a low-boy with a 'for sale' sign on it parked next to the frontage road running to Miller's property."[51] Both the FBI and the sheriff were unable to confirm that the trailer was the stolen one, and they then invited Szombathy to view it.[52] While driving to Superior, he saw two trailers marked "for sale" near the frontage road and although he thought one "might have been his," he "was not sure."[53] When he met with the law enforcement officers, he asked if "he could go to Miller's property" posing "as a prospective buyer."[54] The FBI agent said "that he 'didn't see anything wrong with that at all.'"[55]

When Szombathy arrived at the property he looked at the trailers near the road and then, with the consent of defendant's teenage son, he looked at other trailers in Miller's shop area.[56] He recognized his stolen trailer there despite an alteration in its appearance, and later acknowledged that his trailer had not been visible from the road.[57] In another area, Szombathy also saw the three stolen conveyors.[58] When Szombathy reported his observations to the sheriff and the FBI agent, the latter suggested that they obtain a search warrant.[59] The court stated, "Szombathy decided that, in the meantime, he would go back to Miller's property and photograph the stolen equipment. [The FBI agent] objected to this idea," thinking this might alert the defendant.[60] Szombathy proceeded, and the agent "followed him for protective purposes, positioning himself where he could watch Szombathy with binoculars."[61] Szombathy entered the property and, with the knowledge of defendant's son, again viewed the items and, on this occasion, took pictures.[62] A search warrant was later issued based upon Szombathy's observations, and when it was executed the stolen property was not on the premises.[63] Defendant was indicted for receiving and concealing the trailer, and he moved to suppress the evidence obtained as a result of Szombathy's visits.[64]

---

[49] *See id.* at 655.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* The conveyors had not been visible from the road either. *Id.*
[59] *Id.* at 655–56.
[60] *Id.* at 656.
[61] *Id.*
[62] *See id.*
[63] *Id.*
[64] *Id.*

The district court declined to find that Szombathy had acted as an instrument of the government, and the Court of Appeals agreed.[65] Concluding that Szombathy had acted out of a private motivation, the court expressly declined the government's invitation to conclude its analysis on this basis.[66] Instead, it proceeded to address the government's involvement during the sequence of events.[67] The court noted that Szombathy's actions did not become governmental conduct at the time of his initial articulation of his plan, "when the officers gave tacit approval to [his] plan to visit and gain access to Miller's property."[68] It stated that "Szombathy had not proposed to do anything illegal," and the court reiterated that the visit had been Szombathy's idea.[69] Moreover, on the second visit, when Szombathy returned to take pictures accompanied by the FBI agent who remained off of the property, the agent had followed him "primarily out of a concern for [Szombathy's] safety, not out of any desire to reap the benefits of a private search."[70] Consequently, Szombathy had acted in a private capacity.[71]

The discussion in *Miller* is striking in exhibiting a characteristic that the use of the "multi-factored" *Walther* approach can involve. The *Miller* court had expressly eschewed the government's invitation to conclude its analysis after it found that Szombathy's intention to recover his property was a private one. Instead, in accordance with *Walther*'s apparent directive, the Court of Appeals went on to consider the nature of the government's acquiescence and activity. When addressing the agent's express endorsement of Szombathy's original plan, the court's discussion, underlining the fact that the plan was formulated by Szombathy, illustrates the influence of its "private purpose" analysis upon the question of governmental encouragement. Even more telling was the court's surprising conclusion that the FBI agent's actual participation during the second visit was insufficient to associate the government with the entry because the agent's motivation was to provide protection seems inexplicable without the explanation that the private motivation colored the analysis. Certainly *Miller* presents the possibility that, as a "factor" to be considered among others, a private party's independent motivation can influence a court's view of the nature of the government's involvement.

In 1994, when discussing its decision in *Miller*, the Ninth Circuit later attributed a more determinative importance to the two "critical" *Walther* factors. In

---

[65] *See id.* at 656, 658.

[66] *Id.* at 657.

[67] *See id.* at 657–58.

[68] *Id.* at 657.

[69] *Id.*

[70] *Id.* at 658.

[71] *Id.* The court found, alternatively, that Miller's son had implicitly consented to Szombathy's visits. *Id.* at 658–59.

United States v. Reed,[72] the court stated that in *Miller* "[t]he general principles for determining whether a private individual is acting as a governmental instrument or agent for Fourth Amendment purposes have been synthesized into a two part test."[73] As the standard to be employed in the Ninth Circuit, the court quoted the language of *Miller*: "(1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends."[74] In *Reed*, which involved a drug prosecution, the court concluded that a hotel employee's search of the defendant's room was state action when police "stood guard"[75] as lookouts,[76] and the employee lacked an independent private motive for the search.[77] The court also observed that a sufficient private motivation must be independent of an interest in preventing criminal activity. "[I]f crime prevention could be an independent private motive, searches by private parties would never trigger Fourth Amendment protection and the second prong of the *Miller* test would be meaningless."[78] The court also added that "snooping" is not a legitimate motive.[79] Recently, in *George v. Edholm*,[80] the Ninth Circuit concluded, in the context of a § 1983 action, that the conduct of a private physician who forcibly and without consent removed a plastic baggie from a subject's rectum on the basis of information provided by police may have engaged in a governmental search if the police had falsely stated that the suspect had swallowed cocaine or suffered a seizure.[81] Under these circumstances, the doctor's medical motivation would not have permitted the police to "avoid the requirements of the Fourth Amendment."[82] As a reasonable jury could have so concluded, the motion for summary judgment had been improperly granted.[83] The court emphasized that it held only "that [the doctor's] actions could be attributed to the state," and did "not reach the different question whether a jury could conclude that [the doctor] is himself liable under § 1983."[84]

---

[72] United States v. Reed, 15 F.3d 928 (9th Cir. 1994).

[73] *Id.* at 931.

[74] *Id.* (quoting *Miller*, 688 F.2d at 657).

[75] *Id.* at 929.

[76] *Id.* at 932.

[77] *Id.* In response to the government's contention that the employee had entered the room to ensure that it was not damaged, the court observed that he had admitted that he had no such motivation and "[he] did not stop searching after he had learned the room was in good condition." *Id.* at 931.

[78] *Id.* at 932. Reed's conviction pursuant to his guilty plea was nevertheless sustained because of the untainted evidence that formed a valid basis for the warrant. *Id.* at 929.

[79] *Id.* at 932.

[80] George v. Edholm, 752 F.3d 1206 (9th Cir. 2014).

[81] *Id.* at 1215–16.

[82] *Id.* at 1215.

[83] *See id.* at 1216.

[84] *Id.* For a district court's application of the Ninth Circuit's criteria in the context of a cruise ship employee's search of a passenger's cabin and backpack after the death of his wife, see United States v. McGill, 718 F. Supp. 2d 1240, 1248 (S.D. Cal. 2010), *aff'd*, 564 F. App'x 339 (9th Cir. 2014), *cert.*

A number of circuits have either simply stated the "two factor" *Walther-Miller* standard or have done so with an express emphasis upon some consideration that has also been part of the Ninth Circuit's discussions. In *United States v. Steiger*,[85] the Eleventh Circuit considered the gathering of computer evidence of child sexual exploitation and possession of child pornography that was furnished to Montgomery, Alabama police by an anonymous hacker abroad.[86] Setting forth the two-pronged *Walther-Miller* test,[87] the court considered the use of the source's two e-mails in supporting the issuance of a search warrant. It concluded that "the record is clear that the source acted at all material times as a private individual. . . . The information conveyed in those two e-mails was limited to that which the source had acquired *before* making *any* contact with the [police department]."[88] In *United States v. Feffer*,[89] the Seventh Circuit endorsed the district court's employment of *Walther*'s "two critical factors," adding that "[t]he court's analysis must be made on a case-by-case basis and in light of all the circumstances."[90] The court coupled its embrace of the standard with a mild admonition. In this tax fraud case, the private party, Diane Langron, had been responsible for her employer's accounts payable, accounts receivable, and purchasing.[91] She became concerned when some transactions were not being reported on the company's books, and the proceeds were being directed to the defendants.[92]

At the subsequent suppression hearing, Langron testified that she had been worried about her own responsibility for signing false documents and contacted the IRS, at first anonymously and later identifying herself.[93] Langron met with two IRS agents, provided them with company documents, "and the agents, in turn, told Langron about becoming a numbered informant and about the rewards for which she could apply."[94] She also testified that she met with the agents several times between December 1981 and March 1982.[95] The agent stated "that he had advised

---

denied, 135 S.Ct. 315 (mem.) (2014). According to the court, the FBI, by providing training in crime prevention, "did not direct Carnival to search for and seize evidence implicating the Fourth Amendment. Nor did the FBI acquiesce in such conduct." *George*, 752 F.3d at 1216.

[85] United States v. Steiger, 318 F.3d 1039 (11th Cir. 2003).

[86] *Id.* at 1045.

[87] *Id.* The court stated, "For a private person to be considered an agent of the government, we look to two critical factors: (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the private actor's purpose was to assist law enforcement efforts rather than to further his own ends." *Id.*

[88] *Id.*

[89] United States v. Feffer, 831 F.2d 734 (7th Cir. 1987).

[90] *Id.* at 739.

[91] *Id.* at 735.

[92] *See id.*

[93] *Id.*

[94] *Id.* at 735–36.

[95] *Id.* at 736. The agent estimated the number of meetings was between six and eight after their initial conversation. *Id.*

Langron at the first meeting that he could not encourage her to take any documents, but that it was IRS policy to accept documents voluntarily provided."[96] He received additional documents at two meetings, and while he testified that he had never asked Langron to produce additional documents, he "did admit coming prepared to their second meeting, at Langron's home . . . with a microfilm copier in his car."[97] At that meeting, he received company cash reports, sales invoices, statements, and correspondence.[98] He also acknowledged that, after mentioning to Langron that obtaining copies of tax returns was a "lengthy process," he received copies of defendant Feffer's individual tax returns and other documents in the mail.[99]

In *Feffer*, the Seventh Circuit stated that it would disturb the district court's findings of fact "only if clearly erroneous" and noted that the lower court had "found that Langron's fear of being held liable for her part in the tax fraud motivated her to assist the IRS."[100] As in *Miller*, the district court's conclusion concerning Langron's private motivation proved to be dispositive.[101] The court's language on this matter is perhaps the strongest acknowledgement among the opinions of the Seventh Circuit of the importance of this factor and of the potential for a multi-factored analysis to discourage a focused discussion of the parameters of improper conduct. The court stated:

> So while the agents may have come close to being too receptive and too cooperative in dealing with Langron, the district court did not err in refusing to exclude the fruits of Langron's search once it determined that her search was purely private and not the result of government misconduct . . . . By this we do not condone the agents' conduct, however; and we remind the IRS and its agents that attempts to circumvent the warrant requirements of the fourth amendment through the use of a private party will not be tolerated.[102]

Subsequently, citing *Feffer*, the Seventh Circuit augmented the "two critical factors" derived from the *Walther-Miller* test by stating that "[o]ther useful indicators are whether the private actor performed the search at the request of the government and whether the government offered a reward."[103]

---

[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 739.
[101] *See id.* at 739–40.
[102] *Id.* at 740.
[103] United States v. Koenig, 856 F.2d 843, 847 (7th Cir. 1988) (finding that shipper was pursuing its own business interests in safety and security); *see also* United States v. Ginglen, 467 F.3d 1071, 1075

The Eighth Circuit similarly posed the express question of "whether the citizen acted at the government's request."[104] The Fifth Circuit endorsed the Ninth Circuit's *Walther-Miller* "two factor" approach in *United States v. Bazan*,[105] while at the same time adding the following observations:

> In sum, we hold that where the government has offered no form of compensation to an informant, did not initiate the idea that he would conduct a search, and lacked specific knowledge that the informant intended a search, the informant does not act as a government agent when he enters another's property.[106]

The *Walther-Miller* approach has continued to provide the basis for analysis in that circuit,[107] although, inexplicably, one 1999 opinion referred to the issues addressed in *Bazan*'s "summarizing" remarks quoted above without reference to the "two critical factors" specifically imported in *Bazan* from the Ninth Circuit.[108] The Second Circuit has stated in *United States v. Knoll*[109] that "it is 'immaterial' whether the government originated the idea for a search or joined it while it was in progress. The government may become a party to a search through nothing more than tacit approval."[110] Unfortunately, the Court of Appeals for the Second Circuit has only briefly referred to its unadorned "tacit approval" standard,[111] leaving it for

---

(7th Cir. 2006) (noting that defendant's sons' actions were "consistent with concerned sons attempting to prevent a misguided father from engaging in continued destructive behavior" and the sons did not act to obtain a reward); United States v. Crowley, 285 F.3d 553, 558–59 (7th Cir. 2002) (finding that police had not instructed shipper to open package and were surprised when shipper re-opened it).

[104] United States v. Inman, 558 F.3d 742, 745 (8th Cir. 2009) (quoting United States v. Smith, 383 F.3d 700, 705 (8th Cir. 2004) (finding that the defendant's co-workers had acted "to satisfy their curiosity" without law enforcement's knowledge)).

[105] United States v. Bazan, 807 F.2d 1200, 1203 (5th Cir. 1986).

[106] *Id.* at 1204.

[107] *See, e.g.*, United States v. Blocker, 104 F.3d 720, 725–26 (5th Cir. 1997) (finding that the examination of records was legitimate exercise of state administrative authority); United States v. Pierce, 893 F.2d 669, 673–74 (5th Cir. 1990) (concerning an airline pursuing private policy); United States v. Kirk, 392 F. Supp. 2d 760, 765 (N.D. Miss. 2005) (finding that motives were personal).

[108] *See* United States v. Dahlstrom, 180 F.3d 677, 682 (5th Cir. 1999).

[109] United States v. Knoll, 16 F.3d 1313 (2d Cir. 1994).

[110] *Id.* at 1320 (quoting Lustig v. United States, 338 U.S. 74, 79 (1949) (plurality opinion)). In *Knoll*, a bankruptcy fraud prosecution, the court remanded for a determination of whether files stolen from defendant's office by a private party had been examined before the government "effectively directed" the party to continue to look for more information. *Id.* In a subsequent opinion, it was determined that the search had been completed "and Knoll's reasonable expectation of privacy in the files had been defeated before any government involvement." United States v. Knoll, 116 F.3d 994, 998 (2d Cir. 1997).

[111] *See* United States v. Wolfson, 160 F. App'x 95, 97 (2d Cir. 2005) (finding that the government agent had tacitly approved of only a search of documents that he reasonably thought were in lawful possession of private party).

the district courts to construe its meaning. In *United States v. Jarrett*,[112] the Fourth Circuit stated that "[a]lthough we have never articulated a specific 'test,' we too have embraced this two-factor approach, which we have compressed into '[o]ne highly pertinent consideration,'" restated as "whether the government knew of and acquiesced in the intrusive conduct and whether the private party's purpose for conducting the search was to assist law enforcement efforts or to further her own ends."[113] The court also added that whether the requisite agency relationship exists "is a 'fact-intensive inquiry that is guided by common law agency principles.'"[114] In contrast, the Seventh Circuit has declined to "assert that the constitutional issue . . . necessarily must be governed by the common law definition of agency."[115]

Among the circuits influenced by the *Walther-Miller* multi-factored approach, the First Circuit, in *United States v. Pervaz*,[116] is noteworthy for its expression of the view that an overarching articulation of a "test" to determine state action would not be helpful.[117] Nevertheless, while expressing such reservations, it simultaneously set forth its own characterization of the multiple issues to be examined. In *Pervaz*, it stated,

> We think that any specific "standard" or "test" is likely to be oversimplified or too general to be of help, and that all of the factors mentioned by the other circuits may be pertinent in different circumstances: the extent of the government's role in instigating or participating in the search, its intent and the degree of control it exercises over the search and the private party, and the extent to which the private party aims primarily to help the government or to serve its own interests.[118]

In the First Circuit, these *Pervaz* factors have generally developed into a template for analysis much in the same way as *Walther-Miller*'s "critical factors" have been used in other circuits. The First Circuit's addition of an inquiry into the "degree of control" exercised by the government "over the search and the private party" is similar to an issue later raised by the Fourth Circuit in *Jarrett*.[119]

In applying the *Pervaz* factors, the First Circuit has focused more heavily than the other circuits upon the nature of the police conduct, but, as noted in its

---

[112] United States v. Jarrett, 338 F.3d 339 (4th Cir. 2003).

[113] *Id.* at 345 (quoting United States v. Ellyson, 326 F.3d 522, 527 (4th Cir. 2003)).

[114] *Id.* at 344 (quoting *Ellyson*, 326 F.3d at 537).

[115] United States v. Koenig, 856 F.2d 843, 847–48 n.1 (7th Cir. 1988). Inexplicably, the Fourth Circuit relied upon *Koenig* for its broad position. *See Ellyson*, 326 F.3d at 527. *Ellyson* is also cited in the *Jarrett* decision. *Jarrett*, 338 F.3d at 344.

[116] United States v. Pervaz, 118 F.3d 1 (1st Cir. 1997).

[117] *Id.* at 6.

[118] *Id.*

[119] *Jarrett*, 338 F.3d at 345.

standard, it simultaneously considers factors similar to those encountered by other circuits. *Pervaz* itself had noted that a search was private when it was undertaken by a telephone company for the independent corporate purpose of determining whether its customers were being defrauded.[120] The court also found that there was no evidence that a government agent had "authorized the search or even knew about it."[121] The First Circuit has had several opportunities to elaborate upon its language in *Pervaz*. In *United States v. Momoh*,[122] the court stated that the term "instigation" in *Pervaz* "properly means 'affirmative encouragement,' or alternatively, 'coercing,' 'dominating,' or 'directing' an individual."[123] This language appears to require an active level of encouragement that is also reflected in *United States v. Silva*.[124] There, the First Circuit found that a detective had not participated in a search of defendant's bedroom by his brother.[125] The court expressly relied upon *Pervaz*'s three factors,[126] adding that it "will not find state action simply because the government has a stake in the outcome of a search."[127] Silva was convicted for conspiracy, identity theft, and drug and health care fraud after he had forged prescriptions and had used fake identification to facilitate their use.[128] A search warrant had been issued, in part, based upon items obtained by the brother, Norman, who had entered defendant's bedroom in search of traffic tickets and bills that he believed defendant had accrued in his name.[129] Incriminating items were observed but not seized during Norman's first entry, and when he informed the police he was asked to bring the items to the station.[130] The police had wrongly assumed that Norman had taken the items when he first observed them, and he then entered the room a second time for their seizure.[131] In addition to finding that the detective neither participated in nor controlled the second search, and indeed "did not tell Norman to search Silva's bedroom again because he believed Norman already possessed the items," the court added that the "second search was motivated by [Norman's] desire to clear his name; he returned to the

---

[120] *Pervaz*, 118 F.3d at 6.

[121] *Id.*

[122] United States v. Momoh, 427 F.3d 137 (1st Cir. 2005).

[123] *Id.* at 141 (citation omitted). In *Momoh*, a parcel delivery company was not "instigated" by its desire to comply with Federal Aviation Administration regulations concerning the inspection of overseas packages, and it was also likely that the company was motivated by a desire to refrain from carrying contraband. *Id.* at 141–42; *see also* United States v. Boyd, 298 F. App'x 25, 26–27 (1st Cir. 2008) (finding insufficient instigation where an officer merely asked the private party to "keep an eye out" for a package and did not coerce, "or even ask that [he] seize or search the package on his own").

[124] United States v. Silva, 554 F.3d 13 (1st Cir. 2009).

[125] *See id.* at 18–19.

[126] *Id.* at 18.

[127] *Id.*

[128] *Id.* at 16.

[129] *See id.* at 17.

[130] *Id.*

[131] *Id.*

station with only those items that were relevant to his concerns and that would exonerate him."[132] The court employed a clearly erroneous standard when reviewing these findings by the district court.[133]

While *Momoh*'s and *Silva*'s readings of *Pervaz* focused on specific and active governmental encouragement, an interesting unreported district court opinion, *United States v. Burgos Montes*,[134] decided in 2011, is also instructive on the inquiry within the First Circuit concerning governmental acquiescence. The district court, quoting *Pervaz*'s observation "that 'any specific "standard" or "test" is likely to be oversimplified or too general to be of help,'" declined to regard the three enumerated *Pervaz* factors as representative of "all of the elements that must be present or that may be relevant in a particular case."[135] Citing *Walther*, it observed, "[e]ven though *Silva's* language implies active participation, there is a grey area between overt Government participation and complete absence of participation that should be resolved on a case-by-case basis."[136] *Burgos Montes* indicates that what the court there viewed as a more passive acquiescence by the government seems to remain in play in determining state action within the circuit, at least to some degree. There, the defendant had moved to suppress evidence obtained as a result of a warrantless search of his house and vehicle by Semidey Morales.[137] Before the search, Ms. Morales, who was staying in the defendant's home,[138] executed a Confidential Source Agreement with the DEA.[139] The agreement was provided to her in Spanish, and the English version provided in part, "I understand that I may not, under any circumstances, participate in an act of violence; . . . participate in any activity designed to obtain information by an unlawful method (e.g., breaking and entering, illegal wiretapping, illegal opening of the mail, trespass amounting to illegal search, etc)."[140]

At the suppression hearing, the DEA agent testified that that Semidey Morales "read the document and signed it without asking any questions," and "that he did not explain any part of the document to her nor did he explain what the consequences of an unlawful search and seizure would be."[141] The court added, "In

---

[132] *Id.* at 19.

[133] *See id.*

[134] United States v. Burgos Montes, No. Crim 06-009 JAG, 2011 WL 1743420 (D.P.R. May 2, 2011).

[135] *Id.* at *10 (quoting United States v. Pervaz, 118 F.3d 1, 15 (1st Cir. 1997)).

[136] *Id.* (citing United States v. Walther, 652 F.2d 788, 791 (9th Cir. 1981)).

[137] *Id.* at * 9. This motion to suppress was one of four motions before the court, and the defendant had been indicted for narcotics trafficking, the importation of controlled substances, a count requiring forfeiture, and the homicide of Semidey Morales. *Id.* at *1, *9. Potential punishment included the death penalty. *Id.* at *1.

[138] The court characterized Ms. Morales's presence in defendant's home by saying that she had "practically moved [in]." *Id.* at *12.

[139] *Id.* at *9, *12.

[140] *Id.* at * 9.

[141] *Id.*

essence, his testimony was that she did not ask anything and he did not explain anything because he assumed she understood the document fully."[142] On cross examination, he testified that he instructed her "to specifically gather financial information, information on properties and telephone numbers of associates."[143] Three days later, Ms. Morales provided several documents she had gathered from defendant's house and car.[144] The agent testified that Morales was then told that "she could not bring in any more documents because they could be considered as the product of an illegal acquirement."[145] The DEA retained those she had obtained as evidence because "she had already brought them in."[146] Despite these instructions, she then brought the DEA a copy of the defendant's contract through which he had acquired his farm, and this was retained by the DEA as well.[147] The court stated that

> [w]hile there is no evidence to establish that the DEA overtly instigated the warrantless seizure of the items in question, it was established during the hearing that it specifically ordered Semidey Morales to go out and get the evidence and that it knew she would have complete access to Defendant's property.[148]

Acknowledging that she was motivated by reasons that included a fear of being prosecuted and the receipt of monetary compensation, the court stated that "a mechanical application" of the *Pervaz* factors "would not properly address all the pertinent circumstances and . . . are of little help here."[149] It stated,

> In sum, because the DEA did not explain any part of the Confidential Source Agreement and did not even take any minimal precautionary measures to ensure that the person who would be its eyes and ears within Defendant's home would not also cross the line and seize the physical evidence they specifically instructed her to seek, it deliberately turned its back to the more than potential violation of Defendant's Fourth Amendment rights. This is exactly the type of grey area case described in *Walther*, where the Governments [sic] acquiescence amounted to

---

[142] *Id.*

[143] *Id.*

[144] *Id.* at *10.

[145] *Id.*

[146] *Id.*

[147] *Id.* "She told the agents that she had not taken the [contract]," but it had been given to her by the defendant to photocopy. *Id.*

[148] *Id.* at *11.

[149] *Id.*

> precisely the type of Government participation that triggers the activation of the Fourth Amendment protection.[150]

Finding that Semidey Morales was acting as a government agent, it added,

> The Court will not endorse the DEA's use of the virtual "don't ask don't tell policy" it employed in this case to sign up an informant who practically moved into Defendant's home and seized his personal property before the ink on the Confidential Source Agreement was even dry. Doing so would imply that the Court is willing to turn its back on this type of distressing attitude on the part of law enforcement towards the Fourth Amendment rights of citizens.[151]

In contrast with what might be termed the generalized totality of the circumstances views of the other circuits, the two other courts of appeal that have developed an overall methodology[152] have explored approaches that have imposed an affirmative requirement that a private party must have intended to aid the police. The developments within the Tenth and Sixth Circuits have been very different from one another, however. While the Tenth Circuit continues to require this prerequisite, the Sixth Circuit has recently retreated from such an approach.[153]

In the 2000 decision of *United States v. Souza*,[154] the Tenth Circuit concluded that a United Parcel Service employee's opening of a package constituted state action prohibited under the Fourth Amendment,[155] applying the standard used within the circuit:

> In determining whether a search by a private person becomes a government search, the following two-part inquiry is utilized: "1) whether the government knew of and acquiesced in the intrusive conduct, and 2) whether the party performing the search

---

[150] *Id.* at *12.

[151] *Id.*

[152] Neither the Court of Appeals for the Third Circuit nor the Court of Appeals for the District of Columbia Circuit has done so. *See, e.g.*, United States v. Parish, 468 F.2d 1129, 1138 (D.C. Cir. 1972) (stating that the court "need not explore" issue); Pecorella-Fabrizio v. Boheim, No. 3:08-cv-00348, 2011 WL 5834951, at *7 (M.D. Pa. Nov. 16, 2011) ("The Third Circuit has not articulated a standard for assessing whether an individual acts privately or as an agent or instrument of the government."); United States v. Jackson, 617 F. Supp. 2d 316, 325 (M.D. Pa. 2008) (stating the same).

[153] *Compare* United States v. Souza, 223 F.3d 1197 (10th Cir. 2000) (holding that both prongs of the two part inquiry "must be satisfied before the private search may be deemed a government search") *with* United States v. Booker, 728 F.3d 535 (6th Cir. 2013) (holding that only an analysis of "the first requirement" was necessary).

[154] Souza, 223 F.3d 1197.

[155] *Id.* at 1202.

> intended to assist law enforcement efforts or to further his own ends." *Both prongs must be satisfied before the private search may be deemed a government search.* The totality of the circumstances guides the court's determination as to whether the two-part inquiry has been met.[156]

In *Souza*, DEA agents were training officers on drug interdiction at a UPS facility in Sacramento.[157] A cardboard box attracted the attention of one of the instructing agents, Detective Sloan, because of its heavily taped appearance, its solidity, and the facts that the sender had used only his first name and had sent it through a third party shipper.[158] Detective Sloan suspected that it contained contraband, and, because it could not be compressed, that it had been filled with a type of foam that hardens after it is put in a box.[159] He removed it from the conveyor belt and placed it next to the wall.[160] Another agent, Special Agent Rowden, decided to subject it to a test by a narcotics dog and removed the package from the building. The dog positively alerted to the package.[161] Rowden returned the package to Sloan and stated that he wanted the package to be held while he obtained a warrant.[162] Detective Sloan placed the package next to a wall in the UPS facility.[163] Afterwards, a UPS employee, April Denning, arrived and, according to her testimony, "a conversation was initiated by Detective Sloan."[164] Sloan "told her that a narcotics dog had alerted to the box, and 'stated that they couldn't tell me to open the package, they were not authorized to do that, they would have to get a search warrant, but he pointed to where the package was.'"[165] Minutes later, another officer told Denning, "I cannot tell you to not open the package, but there it is on the floor."[166] In her testimony, Denning stated "that she was influenced by the statements."[167] Sloan continued with his evaluation of other packages.[168]

> Approximately a minute or two after Detective Sloan continued with his evaluation, Denning picked the targeted package up,

---

[156] *Id.* at 1201 (emphasis added) (citations omitted) (quoting Pleasant v. Lovell, 876 F.2d 787, 797 (10th Cir. 1989)).
[157] *Id.* at 1199.
[158] *Id.*
[159] *Id.*
[160] *See id.*
[161] *Id.* at 1200.
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*

> took it a few feet away to where her work station was located, and began opening the package. Detective Sloan watched Denning open the package but did not tell her not to open it because he felt it was "not his right to stop her." He also believed that she was acting within UPS policy in opening the package.
>
> Due to the hardened foam that completely encased everything, Denning had difficulty opening the package. She started tearing some of the foam away and, at that point, DEA agents intervened using a knife to cut through the foam and located the Tupperware container that was inside the package.[169]

The Tupperware contained a substance that was later identified as methamphetamine.[170] A search warrant was obtained for the addressee-defendant's residence, and a controlled delivery was arranged.[171] Souza was arrested after the delivery, and following his indictment for possession with intent to distribute and aiding and abetting, he moved to suppress the drugs.[172] The magistrate judge and district court agreed that the search had violated the Fourth Amendment, but the district court declined to suppress the evidence because a search warrant would have resulted in its discovery.[173]

The Tenth Circuit concluded that the search was governmental and the Fourth Amendment had been violated.[174] It examined both prongs of its standard. The court noted that the officers had specifically targeted the box and isolated it for safekeeping, and then, "twice, within a span of five minutes, attempted to encourage Denning to open the package."[175] It observed that she had testified that these statements had influenced her, and said that "there is no evidence that in this instance Denning had a legitimate, independent motivation to open the package, despite her practice of randomly opening packages on other occasions."[176] It then added that "[p]erhaps most damning of all is that . . . the officers substantially assisted in the search initiated by Denning."[177] While the court reached the conclusion that "the Fourth Amendment would be seriously undermined if the search of the package in this case was [sic] described as anything other than

---

[169] *Id.*
[170] *Id.*
[171] *Id.* at 1200–01.
[172] *Id.* at 1199, 1201.
[173] *Id.* at 1201.
[174] *See id.* at 1202.
[175] *Id.*
[176] *Id.*
[177] *Id.*

orchestrated by the government,"[178] it nevertheless agreed with the district court that the inevitable discovery doctrine foreclosed suppression of the evidence.[179]

The Sixth Circuit's evolution of an affirmative requirement concerning a private party's motivation is reflected in two 1985 opinions. The first, *United States v. Howard*,[180] presented an analysis and conclusion that can properly be viewed as straightforward *Miller-Walther* reasoning. Examining a search by an insurance company investigator who was motivated by the independent intention to determine the liability of the company, the court held that his cooperation with the police and the government's knowledge and participation did not transform the investigator into "an agent of the government."[181] While reaching its conclusion, the court quoted *Walther*'s statement that "two of the critical factors in the 'instrument or agent' analysis are: (1) the government's knowledge or acquiescence, and (2) the intent of the party performing the search."[182] Seven months later, in *United States v. Lambert*,[183] in the context of a drug prosecution, the court considered the retrieval of items by a housekeeper who, after observing open drug

---

[178] *Id.*

[179] *Id.* at 1205–06. With regard to the issue of inevitable discovery, the court concluded that Special Agent Rowden had taken sufficient steps in preparation for a warrant application, and implied that it had "a high level of confidence that the warrant in fact would have been issued." *See id.* at 1205–06.

In *United States v. Poe*, 556 F.3d 1113 (10th Cir. 2009), employing *Souza*'s criteria, the Tenth Circuit rejected the argument that bounty hunters who had searched a residence were state actors. With regard to the bounty hunters' motivation, the court stated,

> Poe cannot establish *Souza*'s second prong because the bounty hunters primarily "intended . . . to further [their] own ends"—their financial stake in Poe's bail—rather than to assist state officials. These bounty hunters were hired to apprehend Poe by the bail bonds company, which was responsible for the bond it posted on Poe's behalf . . . . Financial gain motivated these bounty hunters; they had apprehended Poe and completed the search *before* calling the police. Indeed, they "would have [conducted the search] even if the police had not responded to [their] call." Because the bounty hunters did not intend to assist law enforcement, they are not state actors under the second prong of *Souza*.

Id. at 1124 (citation omitted) (alterations in original). The court also specifically rejected the argument that law enforcement and the bail bonds industry had developed a "symbiotic relationship" which presumably would have been sufficient for a finding of state action by stating that Poe's "argument that law enforcement and the bail bonds industry have a 'symbiotic relationship,' is unpersuasive. We do not inquire if the police benefitted from the private conduct, but if the bounty hunters had a 'legitimate, independent motivation' to conduct the search." *Id.* (citation omitted).

[180] United States v. Howard, 752 F.2d 220 (6th Cir. 1985), *vacated on other grounds*, 770 F.2d 57 (6th Cir. 1985).

[181] *Id.* at 227–28. The investigator testified during defendants' trial for conspiracy, mail fraud, and wire fraud. *Id.* at 222, 227. Despite expressly noting the government's participation, the court did not discuss that factor at length. *Id.* at 227.

[182] *Id.* (quoting United States v. Walther, 652 F.2d 788, 792 (9th Cir. 1981)).

[183] United States v. Lambert, 771 F.2d 83 (6th Cir. 1985).

use in the defendant's house, offered to serve as an FBI informant and received payment for her expenses.[184] The court's conclusion, that she was not acting as a government agent when she removed items from the house in light of the FBI's express instruction not to do so,[185] might well have rested upon a *Miller-Walther* analysis. Instead, the court augmented its earlier discussion from *Howard*:[186]

> A person will not be acting as a police agent merely because there was some antecedent contact between that person and the police. *Rather, two facts must be shown.* First, the police must have instigated, encouraged or participated in the search. Second, the individual must have engaged in the search with the intent of assisting the police in their investigative efforts.[187]

The Sixth Circuit's insistence upon a showing of a private individual's intent to assist a police investigation was reiterated in 2008. In *United States v. Hardin*,[188] the defendant had been sought by police following a petition to revoke his supervised release.[189] Police received information that he might be staying at his girlfriend's apartment and advised her apartment manager of his criminal history. This included a "shootout" with police after an armed robbery that had served as a basis for a conviction.[190] In order to determine if the defendant was present, the officers asked the manager "to go ahead and under a ruse check to see if a water leak was in the apartment to see if he was there."[191] The manager did so, saw the defendant in the apartment, and informed the police.[192] Believing the defendant to be dangerous based upon his prior conviction, they entered the apartment and handcuffed him.[193] They found three firearms, drugs, and cash during a sweep of the apartment, the defendant's pockets, and the couch on which the defendant had been sitting.[194] Defendant, Hardin, was tried and convicted for possession of crack cocaine with intent to distribute, possession of a firearm in furtherance of a drug trafficking crime, and possession of a firearm by a felon.[195] Upon his motion to suppress the physical evidence, he unsuccessfully argued that the apartment

---

[184] *Id.* at 86.

[185] *Id.* at 89.

[186] The *Lambert* decision explicitly references the *Howard* analysis. *Id.* (citing *Howard*, 752 F.2d at 227).

[187] *Id.* (emphasis added) (citation omitted).

[188] United States v. Hardin, 539 F.3d 404 (6th Cir. 2008).

[189] *Id.* at 407.

[190] *Id.*

[191] *Id.*

[192] *Id.* at 407–08.

[193] *Id.* at 408.

[194] *Id.*

[195] *Id.* at 406–07.

manager had been an agent of the government.[196] The district court concluded that the manager, "upon learning from law enforcement that the defendant may be in one of the apartments, had an independent duty to investigate further and confirm whether, in fact, [Hardin] was in the apartment."[197] Responding to the government's argument that the manager had an independent motivation to protect the other apartment residents from harm, the Court of Appeals cited *Howard* for its conclusion that there the insurance investigator had an "entirely independent"[198] business motivation, and noted that here, "Prior to the officers' arrival and conversation with him, the apartment manager had absolutely no intent to search Apartment 48. Far from being 'entirely independent' of the government's intent, the manager's intent to search Apartment 48 was wholly *dependent* on the government's intent."[199] Most significantly, in light of the Sixth Circuit's discussion of *Lambert* in a subsequent opinion, the court then added that *Lambert*'s two requirements had "clearly" been satisfied.[200] "[T]he manager had an intent to assist the officers with their effort to arrest and remove Hardin from the premises. . . . [T]he manager was acting only to assist the officers . . . so that they could arrest him."[201] The *Lambert* standard thus led to the conclusion that the manager was an agent of the government.[202]

The Sixth Circuit has only recently eliminated its prerequisite that a private party's intent to assist the police is necessary to a finding of state action. It did so under circumstances in which the shortcomings of this requirement were evident, and this development within the circuit appeared to suggest a judicial assessment of the potentially secondary importance of an inquiry into a private party's motivation when governmental encouragement or acquiescence is sufficiently substantial. In *United States v. Booker*,[203] the defendant moved to suppress a five-ounce rock of crack cocaine that had been retrieved from his rectum by an emergency room physician.[204] Booker had been in the front passenger seat of a car that was stopped by a K-9 officer for expired tags.[205] When the officer smelled marijuana, the driver, who was defendant's brother, consented to a search of the vehicle.[206] Before doing so, as the officer returned to his car to check on driver's license status and outstanding warrants, he saw defendant "moving around, as if he was attempting to

---

[196] *Id.* at 409.
[197] *Id.*
[198] *Id.* at 418 (quoting United States v. Howard, 752 F.2d 220, 227 (6th Cir. 1985)).
[199] *Id.*
[200] *Id.* at 419.
[201] *Id.*
[202] *See id.* at 419–20.
[203] United States v. Booker, 728 F.3d 535 (6th Cir. 2013).
[204] *Id.* at 539–40.
[205] *Id.* at 537.
[206] *Id.*

conceal something."[207] During the previous year, the officer had arrested the defendant "and recovered thirteen bags of marijuana that Booker hid in his crotch."[208] After the officer completed his checks, his trained drug-sniffing dog alerted near the front passenger side door of the car where defendant was seated.[209] He was asked to step out of the car, and while a pat-down produced no drugs the officer noted that Booker "cl[e]nched his butt[ocks] together" when patted in that area.[210] Large amounts of currency were in defendant's pockets, and a search of the front passenger seat revealed one packet containing .06 grams of marijuana and two packets containing "residue."[211] The officer also "noticed marijuana 'ground up into the floor' of the passenger-side seat."[212] While insufficient marijuana was recovered to permit an arrest under state law, defendant was nevertheless arrested for felony possession of marijuana.[213] He was handcuffed with his hands behind his back, and was transported to the police station.[214]

At the station, defendant was placed in an interview room and read his *Miranda* rights, at which time an officer noticed that he was "fidget[ing] and try[ing] to put his hands in the back of his pants."[215] This prompted the officer to move the handcuffs to Booker's front.[216] A short scuffle ensued after the police were out of the room and Booker tried to bar their reentry, but another pat-down and search of the room revealed no contraband.[217] Defendant was then transported to the Anderson County Detention Facility in Clinton, Tennessee. An officer stated that he "fidgeted" during the drive.[218]

"The detention facility did not have a policy of strip searching all new detainees, and there [was] no indication whether Booker was going to be placed in the general population of the facility."[219] A sheriff's deputy stationed there agreed, however, based on the officers' suspicions, "to strip search Booker to determine if he was concealing contraband in his buttocks."[220] During that search, the deputy stated that he saw "a small string protruding from [Booker's] anus."[221] When asked about that object, Booker attempted "to cover the area and tried to push the object

---

[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.* Other officers were involved in this transportation and in subsequent events. *See id.* at 537–41.
[215] *Id.* at 538.
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Id.*

further into his rectum."[222] Another altercation ensued, Booker was restrained, and the deputy's supervisor ordered him to take Booker to a hospital.[223]

At the beginning of its opinion, the Court of Appeals characterized this transportation to an emergency room as grounded in reasonable suspicion "that Booker had contraband hidden in his rectum."[224] Booker was taken to the hospital while naked, "shackled[,] and covered only in a blanket because the officers did not believe that there was sufficient time to get him dressed."[225] One officer, traveling separately to the hospital, arrived before Booker and told the emergency room physician, Dr. Michael LaPaglia, that he "strongly suspected that Booker had drugs in his rectum."[226] Twice before during the preceding three years, officers had brought suspects to LaPaglia "so that he could perform a digital rectal examination, . . . a procedure in which a physician inserts a finger into the patient's anus to probe the rectum."[227]

When Booker arrived, "still naked and handcuffed," he denied hiding drugs in his rectum and refused to submit to the procedure.[228] During the suppression hearing, the doctor testified that he then "replied that Booker 'really did not have a choice because if my suspicion was high enough to think that he had some sort of dangerous substance in his rectum, then it was my duty to get it out.'"[229] Throughout the suppression hearing, "LaPaglia reiterated that his 'duty' was medical in nature."[230] Following Booker's refusal, the doctor told him that "if [Booker] did not cooperate [LaPaglia] would administer muscle relaxants or, if necessary, paralyze Booker in order to perform the rectal examination."[231] LaPaglia stated that Booker then gave consent to a rectal examination, but since none of the other four witnesses so testified the Court of Appeals noted that the record did not support a conclusion that informed consent was given.[232]

Dr. LaPaglia attempted a digital rectal examination, but Booker contracted his anal and rectal muscles and prevented it.[233] Then

> LaPaglia ordered a nurse to inject muscle relaxants into Booker's left buttock. On the second attempt, Booker remained uncooperative and LaPaglia could not complete the examination,

---

[222] *Id.*
[223] *Id.*
[224] *Id.* at 537.
[225] *Id.* at 538.
[226] *Id.*
[227] *Id.*
[228] *Id.* at 539.
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] *See id.* at 539, 541–42.
[233] *Id.* at 539.

> but he could feel a foreign object inside Booker's rectum, convincing LaPaglia that completion of the rectal examination was imperative. Finally, LaPaglia directed an emergency room nurse . . . to administer a sedative and a paralytic agent to Booker intravenously, and had him intubated to control his breathing. At 4:12 p.m., Booker was intubated. He remained intubated for about an hour, unconscious for twenty to thirty minutes, and paralyzed for seven to eight minutes. While Booker was paralyzed, LaPaglia removed a rock of crack cocaine, greater than five grams, from Booker's rectum. LaPaglia then turned over the crack rock to Officer Steakley, who took it for evidence.[234]

Booker was indicted for one count of possession with intent to distribute more than five grams of cocaine base, and following a hearing on his motion to suppress, both the magistrate judge and the district court found the search constitutional.[235]

The Court of Appeals found that Booker's Fourth Amendment rights had been violated,[236] noting that "[e]ven though the doctor may have acted for entirely medical reasons, the unconsented procedure while Booker was under the control of the police officers must, in the circumstances of this case, be attributed to the state."[237] It added that "[t]he unconsented procedure, moreover, shocks the conscience at least as much as the stomach pumping that the Supreme Court long ago held to violate due process."[238] With regard to the "sufficiently close nexus" for Fourth Amendment purposes between "the officers' participation, knowledge, and custody" and LaPaglia's conduct to make it "attributable to the police," the court observed,

> When police officers bring a suspect in custody to a purportedly independent actor, and stand by without interfering while the actor unlawfully batters the subject in a way that the police clearly could not, it can hardly be argued that resulting evidence is admissible. In some circumstances this must be true no matter what the intent of the independent actor.[239]

---

[234] *Id.* at 539–40.
[235] *Id.* at 540.
[236] *Id.*
[237] *Id.* at 537.
[238] *Id.*
[239] *Id.* at 540. The court added,

> LaPaglia must be treated as a government agent for Fourth Amendment purposes because the suspect was in the physical control of the police, the police knew what LaPaglia was going to do, the police knew that Booker did not consent, and a reasonable police officer would know that the doctor did not, independent of

The court concluded that "[i]n short, the police effectively used Dr. LaPaglia as a tool to perform a search on Booker's person."[240] The court then addressed *Lambert*'s stated requirement that, in addition to the need for police instigation, encouragement, or participation in a search, a private party "must have engaged in [a] search with the intent of assisting the police in their investigative efforts."[241] The court characterized that language as dictum, "entirely unnecessary to our resolution of the *Lambert* case."[242] It stated that in *Lambert* the "analysis of whether the housekeeper was an agent focused entirely on the first requirement, and conceded that the housekeeper had the intent of assisting the police."[243] *Booker* thus appears to relegate the issue of a private party's motivation to the status of a factor to be considered by the Sixth Circuit along with the degree of police participation or encouragement. While, to be sure, the court's language and *Booker*'s facts may lend themselves to a future interpretation in which a private individual's motivation would become immaterial only under circumstances of extreme police instigation, the methodology of the Sixth Circuit in assessing state action now appears to conform more closely with that of a majority of the federal circuits.

II. TOWARDS RESTRUCTURING THE INQUIRY

The prevalent multi-factored approaches used within the federal circuits in their determination of the basic issue of whether a search constitutes state action are clearly designed to incorporate considerations that can bear upon the question of whether relief is appropriate under such a claim. However seductive this totality of the circumstances methodology might seem in its simultaneous consideration of potentially important factors, it is problematical in failing to provide the most appropriate avenue for a thorough judicial discussion of the nature of inappropriate police encouragement. In the most frequent formulation among the circuits, the hallmark of this approach has of course been the exploration of the government's

---

> police direction, have the legal authority to intubate and paralyze the suspect without his consent.

Id. at 541.

[240] *Id.* at 543.

[241] *Id.*

[242] *Id.*

[243] *Id. Hardin* was only briefly discussed in light of its resolution and a parallel factual consideration: "Just as the landlord in *Hardin* could not enter the premises in the absence of an emergency under Tennessee law, Dr. LaPaglia could not intubate and paralyze a conscious and competent Booker except with consent under Tennessee law." *Id.* at 544.

conduct along with the examination of the issue of the motivation of the private party.[244]

The issue of state action should initially be focused upon how the state has acted. The matter of whether a remedy should be provided is a distinct issue, and, as is evident in the current development of the Supreme Court's overall exclusionary rule jurisprudence, that question may certainly be dispositive in a given case.[245] An examination of the private party's perspective quite properly belongs to this latter inquiry, and calls for a thorough exploration in that context. The prevalent approach of the circuits, in blurring the distinctions between these two separate matters by means of a unitary test, has, at times, had the effect of stifling the sort of extended discussion of the state's activity that seems warranted.

A more appropriate approach would be to require a sequential analysis, involving an initial examination of whether a state actor has participated in, instigated, or encouraged a private party's search. If so, any failure of the searching party to comply with the requirements of the Fourth Amendment should presumptively result in the suppression of the evidence obtained. Under this more appropriate analysis, a suitable standard of proof should then be formulated for determining whether the countervailing determinative circumstance of a private party's independent purpose motivated the search and should preclude suppression. This structured two-tiered approach, with its central inquiry into the state's activity, would be consistent with the Court's overriding concern with the nature of a state's participation in its other state action analyses. It would reduce the risk of a private party's motivation improperly coloring the judicial assessment of the state's actions, and it would strongly encourage a court to focus on each matter in depth. A discussion of important elements in this suggested sequential inquiry is in order.

A. Governmental Participation, Instigation, or Encouragement

The principle that a state's *actual* participation in a search or seizure presents a cognizable Fourth Amendment issue, quite apart from any question involving a private party's participation, is so axiomatic in Supreme Court doctrine that it requires little attention. Thus, in 1921, in *Burdeau v. McDowell*,[246] the Court

---

[244] Subsidiary factors in some formulations, such as whether a payment is offered by the government or the degree of the government's control, may appropriately be characterized as bearing upon these issues. *See, e.g.*, United States v. Ginglen, 467 F.3d 1071, 1074 (7th Cir. 2006) (stating that the government's offer of a reward is a consideration); United States v. Shahid, 117 F.3d 322, 326 (7th Cir. 1997) (holding that the government lacked the ability to "control or induce[] decisions of mall security officers").

[245] *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 599 (2006) (holding that an exclusionary remedy was not appropriate for a violation of the knock and announce requirement); Illinois v. Krull, 480 U.S. 340, 349–50 (1987) (holding that the exclusionary rule is inapplicable when officers reasonably rely upon an apparently valid statute); United States v. Leon, 468 U.S. 897, 918–19 (1984) (holding that the exclusionary rule is inapplicable when officers reasonably rely upon an apparently valid search warrant).

[246] Burdeau v. McDowell, 256 U.S. 465 (1921).

observed that "[t]he Fourth Amendment gives protection against unlawful searches and seizures, and . . . its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority."[247] The current use of a totality of circumstances approach has even threatened this basic principle. In *United States v. Souza*,[248] discussed above, when a DEA agent used his own knife to assist a UPS employee in cutting through hardened foam which encased contraband,[249] that very fact should have been conclusive on the issue of sufficient state involvement and that inquiry should have been at an end. Instead, the court considered the agent's participation as a factor which contributed to its finding of state participation.[250]

On other occasions, the application of a totality of the circumstances approach has also seemed to undermine the basic consequence of active governmental participation, despite the fact that *Walther* had initially formulated its inquiry with a focus on the "'gray area' *between* the extremes of overt governmental participation in a search and the complete absence of such participation."[251] While these subverting analyses concerning actual police participation are by no means the norm, they have appeared with sufficient frequency to be of concern. In *United States v. Reed*,[252] in an approach similar to *Souza*'s, the Ninth Circuit reached its conclusion that the police's standing guard as lookouts constituted sufficient participation only after it considered whether the private party had an independent motivation.[253] Most strikingly, as discussed above, the same Court of Appeals concluded earlier in *United States v. Miller*[254] that an FBI agent's actual participation as a lookout for a searching private party did not constitute state action because it was motivated "primarily out of a concern for [the private party's] safety" rather than "[a] desire to reap the benefits of a private search."[255] The court's conclusion that a police lookout's concern for the safety of a principal actor disassociates the officer from the searcher's activity for state action purposes was astoundingly novel. As was suggested above, the *Miller* court's view of the significance of the government's actual participation appears to have been influenced by its conclusion that the searcher's motivation was a private one. *Miller* therefore also illustrates the potential obfuscation of an appropriate examination of the government's actual involvement under the prevalent unitary totality of the circumstances approach.

---

[247] *Id.* at 475.
[248] United States v. Souza, 223 F.3d 1197 (10th Cir. 2000).
[249] *Id.* at 1200.
[250] *See id.* at 1202.
[251] *See* United States v. Walther, 652 F.2d 788, 791 (9th Cir. 1981) (emphasis added).
[252] United States v. Reed, 15 F.3d 928 (9th Cir. 1994).
[253] *Id.* at 929–32.
[254] United States v. Miller, 688 F.2d 652 (9th Cir. 1982).
[255] *Id.* at 658.

As important as a court's characterization of actual governmental involvement in a search may be, in the absence of such actual participation, a court's discussion of the extent and consequences of particular acts of governmental encouragement provides a critical opportunity for appellate guidance. The federal circuits have considered a range of circumstances: whether the government instigated the idea of the private party search,[256] the nature of the government's instructions to the private party,[257] whether the government offered the private party a reward,[258] and, as reflected in *Walther*, whether the private party had an ongoing relationship with the government which had encouraged similar searches in the past.[259] The prevalent multi-factored analysis does not sufficiently direct the inquiry to a focused exploration of the encouragement, however. The Seventh Circuit's vague comment in *United States v. Feffer*[260] that government agents "may have come close to being too receptive and too cooperative in dealing with [the informant],"[261] illustrates a missed opportunity for articulating police boundaries with clarity, and was the direct result of the court's simultaneous discussion of the informant's motivation.[262] One significant case among the circuits, *United States v. Jarrett*,[263] stands out in highlighting one of the most problematical issues concerning governmental instigation—that is, a situation in which the police make an overt statement or reference to a private party about that person's ability to search free of constitutional constraints.[264] The question of whether such a reference constitutes non-explicit, but in fact mutually understood, police encouragement of the search has under current analyses remained subject to the individual assessment of a reviewing court. In *Jarrett*, the Fourth Circuit characterized an instance of such a "proverbial 'wink and a nod,'"[265] and while the court's holding may appropriately be criticized on other grounds, its frank identification of the practice does prompt a critical assessment of whether the problem it presents is so intractable as to defy remediation.

---

[256] *See, e.g.*, United States v. Benoit, 713 F.3d 1, 9 (10th Cir. 2013) (holding that the government had not instigated search of defendant's computer by his girlfriend); United States v. Inman, 558 F.3d 742, 745 (8th Cir. 2009) (considering "whether the citizen acted at the government's request"); United States v. Dahlstrom, 180 F.3d 677, 682 (5th Cir. 1999) (considering whether the individual initiated the idea "on his own").

[257] *See* United States v. Lambert, 771 F.2d 83, 89 (6th Cir. 1985) ("[The housekeeper] was told on several occasions that she should not take items from the house.").

[258] *See* United States v. Ginglen, 467 F.3d 1071, 1075 (7th Cir. 2006) (noting that a lack of "reward" was a factor in the court's determination); *Dahlstrom*, 180 F.3d at 682 (stating that compensation is a factor to consider).

[259] *See* United States v. Walther, 652 F.2d 788, 793 (9th Cir. 1981) ("[The government] had certainly encouraged [the private party] to engage in this type of search.").

[260] United States v. Feffer, 831 F.2d 734 (7th Cir. 1987).

[261] *Id.* at 740.

[262] *See id.*

[263] United States v. Jarrett, 338 F.3d 339 (4th Cir. 2003).

[264] *See id.* at 341.

[265] *Id.* at 343.

Jarrett involved a prosecution for the manufacture and receipt of child pornography, and the court held that the same anonymous computer hacker who had provided information that led to the conviction in *United States v. Steiger*[266] had not acted as a government agent when he subsequently searched Jarrett's computer.[267] The defense had argued, and the district court had agreed, that extensive e-mail messages between the hacker, referred to as Unknownuser, and law enforcement authorities during and after the *Steiger* prosecution had constituted sufficient encouragement for the search to be attributable to the government.[268] The Fourth Circuit's examination of the language, timing, and significance of the communications was critical to its analysis of whether, in its view, an "agency relationship" had developed between Unknownuser and the government.[269]

In his searches of both Steiger's and Jarrett's computers, Unknownuser, who was in Turkey and remained anonymous throughout, gained access through a Trojan Horse program that he "attached to a picture he posted to a news group frequented by pornography enthusiasts."[270] When downloaded, the program allowed Unknownuser to enter the receiving computer and examine its contents.[271] As noted above, evidence of child pornography was discovered on Steiger's computer, and it was forwarded to the police.[272] In late 2000, after Steiger was indicted, FBI Special Agent James Duffy, attaché for the FBI in Turkey, contacted Unknownuser by both e-mail and phone.[273] In these communications, Duffy told Unknownuser that he would not be prosecuted for his assistance, unsuccessfully sought a meeting, and posed questions "with the hope that Unknownuser would reveal his identity and perhaps agree to testify at Steiger's trial."[274] Significantly, in an e-mail "Duffy closed this exchange . . . by thanking Unknownuser for his assistance and stating that 'If you want to bring other information forward, I am available.'"[275] Agent Duffy again contacted Unknownuser by e-mail five months later, informing him of a trial postponement, thanking him again, and reiterating that Unknownuser would not be prosecuted "should he decide to serve as a witness."[276] Unknownuser again stated that he would not reveal his identity.[277]

---

[266] United States v. Steiger, 318 F.3d 1039, 1045 (11th Cir. 2003). *See supra* notes 85–88 and accompanying text.

[267] *Jarrett*, 388 F.3d at 340–41.

[268] *Id.* at 341–43.

[269] *Id.* at 345–46.

[270] *Id.* at 341.

[271] *Id.*

[272] United States v. Steiger, 318 F.3d 1039, 1041–42 (11th Cir. 2003).

[273] *Jarrett*, 388 F.3d at 341.

[274] *Id.*

[275] *Id.*

[276] *Id.*

[277] *Id.*

The next contact between Unknownuser and law enforcement was approximately seven months later, "when Unknownuser sent an unsolicited email to his contact at the Montgomery, Alabama Police Department."[278] He informed the officer there that "he had 'found another child molester.'"[279] This allegation concerned Jarrett.[280] Unknownuser sent e-mails and attached files collected from Jarrett's computer to the Montgomery officer, who forwarded them to the FBI.[281] The FBI investigated and, after filing a criminal complaint, applied for and executed a search warrant.[282] Jarrett was arrested, and shortly afterwards, on December 16, 2001, Agent Duffy, who "was unaware of the Jarrett investigation,"[283] contacted Unknownuser to "inform[ ] him of Steiger's sentence and [to thank] Unknownuser for his assistance in the case."[284] Unknownuser replied, informing Duffy of the matter concerning Jarrett.[285] He inquired about that investigation's progress, and "[asked] Agent Duffy to have Agent Margaret Faulkner—a special agent based in Alabama who had been involved in the Steiger investigation—contact him."[286] Agent Duffy then replied and updated Unknownuser about the matter, "and request[ed] that Unknownuser maintain email contact with Agent Faulkner via her personal email address."[287]

Jarrett was indicted, and he moved to suppress the evidence obtained during the execution of the search warrant because the warrant had been issued based upon the information provided by Unknownuser.[288] The motion was denied, and Jarrett entered a conditional guilty plea to a single charge of manufacturing child pornography.[289] Before sentencing, however, Jarrett moved for a reconsideration of his motion to suppress on the basis of new evidence, which the government did not disclose until after his guilty plea.[290] The evidence consisted of "a series of emails exchanged between Unknownuser and FBI agent Faulkner, beginning shortly after Jarrett's arrest and extending for almost two months."[291] The Fourth Circuit characterized the exchange as follows:

> In the initial email in this series, dated December 19, 2001, Agent Faulkner explicitly thanked Unknownuser for providing

---

[278] *Id.* at 341–42.
[279] *Id.* at 342.
[280] *Id.*
[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *See id.*
[286] *Id.*
[287] *Id.*
[288] *Id.*
[289] *Id.*
[290] *Id.* at 342–43.
[291] *Id.* at 342.

> the information to law enforcement officials. She then engaged in what can only be characterized as the proverbial "wink and a nod":
>
> I can not ask you to search out cases such as the ones you have sent to us. That would make you an agent of the Federal Government and make how you obtain your information illegal and we could not use it against the men in the pictures you send. But if you should happen across such pictures as the ones you have sent to us and wish us to look into the matter, please feel free to send them to us. We may have lots of questions and have to email you with the questions. But as long as you are not 'hacking' at our request, we can take the pictures and identify the men and take them to court. We also have no desire to charge you with hacking. You are not a U.S. citizen and are not bound by our laws.
>
> Over the course of the next two months, Agent Faulkner sent at least four additional email messages, which constituted, in the words of the district court, a "'pen-pal' type correspondence" with Unknownuser. In addition to expressing gratitude and admiration for Unknownuser, Faulkner repeatedly sought to reassure Unknownuser that he was not a target of law enforcement for his hacking activities.. . . .
>
> In his responses to Agent Faulkner, Unknownuser spoke freely of his "hacking adventures" and suggested in no uncertain terms that he would continue to search for child pornographers using the same methods employed to identify Steiger and Jarrett. As found by the district court, Agent Faulkner, despite her knowledge of Unknownuser's illegal hacking, "never instruct[ed] Unknownuser that he should cease hacking."[292]

The district court reversed its earlier ruling and suppressed the evidence obtained pursuant to the warrant, and, deeming Jarrett's motion to reconsider as a motion to withdraw his guilty plea, granted that as well.[293] It "reasoned that the 'totality of all the contact between law enforcement and Unknownuser encourage[d] Unknownuser to continue his behavior and to remain in contact with

---

[292] *Id.* at 343.
[293] *Id.*

the FBI.'"[294] The court concluded that the parties had "expressed their consent to an agency relationship,"[295] and held that the evidence obtained as a result of Unknownuser's hacking was inadmissible.[296]

The Court of Appeals disagreed, observing that the district court:

> [C]oncluded that Unknownuser's extensive post-search email exchange with Agent Faulkner, together with the brief exchanges between Unknownuser and Agent Duffy in November and December 2000 (one year prior to the Jarrett search) and May 2001 (seven months prior to the Jarrett search), demonstrated that the Government had an "ongoing relationship" with Unknownuser sufficient to make Unknownuser an agent of the Government. . . .
>
> Although, as the Government conceded at oral argument, the Faulkner email exchange probably does constitute the sort of active Government participation sufficient to create an agency relationship going forward (absent other countervailing facts), the district court erred in relying on this exchange to find that the Government knew of and acquiesced in the Jarrett search.[297]

The court stated that such reliance was misplaced because "Unknownuser's email exchange with Faulkner took place *after* Unknownuser had hacked into Jarrett's computer," and the fruits of that search had resulted in the issuance of the warrant and Jarrett's arrest.[298] "Thus, Faulkner's knowledge and acquiescence was entirely post-search. Such after-the-fact conduct cannot serve to transform the prior relationship between Unknownuser and the Government into an agency relationship with respect to the search of Jarrett's computer."[299]

With regard to Unknownuser's *pre*-search communications with Agent Duffy, including Duffy's e-mail in December 2000 stating that "[i]f you want to bring other information forward, I am available,"[300] the court characterized them as "brief," having taken place "seven to twelve months before the Jarrett search," and consisting of

> nothing more than perfunctory expressions of gratitude for Unknownuser's assistance in the Steiger investigation, assurances

---

[294] *Id.*
[295] *Id.*
[296] *Id.*
[297] *Id.* at 346.
[298] *Id.*
[299] *Id.*
[300] *Id.* at 341.

> that Unknownuser would not be prosecuted should he decide to testify . . . and a vague offer of availability to receive more information in the future. Without more, these exchanges do not suffice to create an agency relationship that would embrace the Jarrett search.[301]

While the court's concern with the suitability of proof concerning an "ongoing relationship"[302] was responsive to the framing of the issue by the district court, the Fourth Circuit's derogation of the significance of Duffy's pre-search expression of "availability to receive more information"[303] misses the point on the significance of a "wink and a nod" form of encouragement. Far from being "vague,"[304] or "too remote in time and too tenuous in substance"[305] to constitute impermissible encouragement, Duffy's statement, in and of itself, conveyed the necessary information to Unknownuser concerning his freedom from constitutional restraints. Once that genie was pulled from the bottle, no repetition was necessary to reinforce Unknownuser's belief that he was free to act and that a governmental sanctioning of similar searches awaited him.

The "wink and a nod" is not an unapproachable problem. It targets and threatens the core values of the Fourth Amendment, with its parameters upon governmental intrusion. The practice may appear in language that is brazen or in a form that is subtle enough to prompt an appellate court's conclusion that it is "brief" or "vague." In whatever form, it should be squarely addressed with a policy that holds that, whenever a governmental official makes a reference or statement to a private party concerning that party's ability to search or seize free of constitutional or other legal constraints, that will be deemed encouragement for state action purposes.

B. The Private Party's Motivation

Under the suggested sequential approach, when it has been determined that the state has participated in, instigated, or encouraged a private party's search and that the private party has exceeded the boundaries established by the Fourth Amendment, the presumption that the evidence must be suppressed would be

---

[301] *Id.* at 346.

[302] *Id. Jarrett* has been criticized for the narrowness of its view in evaluating the relationship. *See* Andres A. Muñoz, Comment, United States v. Jarrett, 49 N.Y.L. SCH. L. REV. 411, 411–12 (2004). For advocacy of a statutory remedy for the actions of private computer hackers, see Monica R. Shah, Note, *The Case for a Statutory Suppression Remedy to Regulate Illegal Private Party Searches in Cyberspace*, 105 COLUM. L. REV. 250 (2005).

[303] *Jarrett*, 338 F.3d at 346.

[304] *Id.*

[305] *Id.* at 347.

rebuttable by a showing that a private party's independent purpose had motivated the search. The fashioning of an appropriate standard of proof for rebuttal should be informed by the Supreme Court's discussion of the inevitable discovery doctrine in *Nix v. Williams*,[306] since the restructuring of the state action inquiry to independently inquire into a countervailing private motivation appears to implicate parallel concerns. In *Nix*, when first implementing the doctrine in the context of a Sixth Amendment violation, the Court found that "[i]f the prosecution can establish by a preponderance of the evidence that the [unconstitutionally obtained evidence] ultimately or inevitably would have been discovered by lawful means,. . . the deterrence rationale [of the exclusionary rule] has so little basis that the evidence should be received."[307] The issue of the standard of proof was expressly debated among the justices. In his dissent, Justice Brennan unsuccessfully argued that this "hypothetical finding" required a heightened standard of clear and convincing evidence "to protect fully the fundamental rights served by the exclusionary rule."[308] In the instant context, quite apart from avoiding the anomaly of employing the higher criterion, requiring the conscientious application of a preponderance of the evidence standard would appear to be sufficient to protect Fourth Amendment interests in rebutting the presumption of exclusion.

The true challenge in addressing arguably countervailing private party motivations would be in the maintenance of the appropriate focus of any such inquiry. The Ninth Circuit recently articulated the issue succinctly: "Police officers may not avoid the requirements of the Fourth Amendment by inducing, coercing, promoting, or encouraging private parties to perform searches *they would not otherwise perform*."[309] The question of whether the specific search at issue would have been undertaken by the private party is absolutely critical to the matter of whether the private party's motivation can preclude the exclusion of the evidence. In examining the private motivation, the possibility of a court's framing the issue only in terms of the generalized authority of a private actor is always present. The current totality of the circumstances approach can obscure the importance of this refined inquiry, and the suggested restructured analysis would serve to crystallize a court's consideration of the proper issue to be considered.

This sort of error was evident under the currently prevalent approach in the Eighth Circuit's opinion in *United States v. Smith*.[310] In *Smith*, a "police officer . . . who was participating in a 'parcel interdiction' operation at a Federal Express . . . facility . . . removed a suspicious looking package from a conveyor belt."[311] She then gave it to Detective Catano, who submitted it to a canine sniff that indicated the

---

[306] *See* Nix v. Williams, 467 U.S. 431, 441–43 (1984).

[307] *Id.* at 444.

[308] *Id.* at 459 (Brennan, J., dissenting).

[309] George v. Edholm, 752 F.3d 1206, 1215 (9th Cir. 2014) (emphasis added).

[310] *See* United States v. Smith, 383 F.3d 700 (8th Cir. 2004).

[311] *Id.* at 703.

presence of drugs.[312] At that point, the detective "took the package to Lee Edwards, the FedEx facility manager, and told her that the suspected package contained drugs. Edwards asked whether Catano wanted her to open the package. Detective Catano testified that he told her that 'if she wanted to open it that would be fine.'"[313] The manager opened the package, discovered a substance, which proved to be cocaine, and the package was taken by the police, resealed at the police station and a controlled delivery to the defendant was arranged.[314] At defendant's trial for drug possession, his motion to suppress the cocaine was denied by the district court.[315]

Examining both *Walther-Miller* factors, the court first concluded that "the government's knowledge and acquiescence, when considered in light of Catano's communication to Edwards that the decision was hers alone to make, did not make Edwards a government agent."[316] With regard to the issue of the manager's motivation, the court stated:

> With respect to the question of intent, the district court found that Edwards's decision to inspect the package, even if accompanied by a dual motive of assisting the officers, was motivated by her obligation to ensure that her employer was not being used as a means of carrying contraband. As the Supreme Court has pointed out, a commercial carrier such as FedEx has a "duty to refrain from carrying contraband," and such a carrier's employees may act to ensure compliance with that duty. That a private citizen is motivated in part by a desire to aid law enforcement does not in and of itself transform her into a government agent.[317]

In *Smith*, the Eighth Circuit simply did not address the issue of whether the manager's search would have been performed had it not been for the police's singling out of the package, employing a canine search, and conveying it to her. Although *Smith*'s inadequate analysis is not a frequently occurring error among the opinions of the Courts of Appeals,[318] the suggested sequential approach would

---

[312] *Id.*

[313] *Id.*

[314] *Id.*

[315] *Id.*

[316] *Id.* at 705.

[317] *Id.* (citation omitted). The authority citing a carrier's "duty to refrain from carrying contraband," *Illinois v. Andreas*, 463 U.S. 765, 769 n.1 (1983), did not, of course, address a carrier's inspection of a package that had been identified by police. *See id.* at 766–68.

[318] For an excellent example of a case that quite properly examines the issue of whether a particular search occurred as a result of a private motivation, see United States v. Howard, 752 F.2d 220 (6th Cir.

provide specificity to the inquiry concerning rebuttal of a presumption of suppression that would go far in preventing such a loss of focus.

CONCLUSION

The suggested restructuring of the circuits' current multi-factored totality of the circumstances approaches will sacrifice nothing with regard to an appellate court's ability to examine those matters which are now viewed as critical to a determination of state action in the context of private party searches. The suggested approach will underline the importance of an examination of governmental encouragement as the focus of the inquiry. Clarifying the process by requiring a separate examination of each issue in detail, it will help to avoid the distorting influence of private motivation upon a judicial assessment of governmental involvement. Unlike the current unitary mode of inquiry, this structured approach would also leave no doubt about the weight to be afforded to a clearly identifiable, independent private motivation for the search at issue. Most importantly, in providing encouragement for judicial rigor in examining each of these considerations, the suggested approach will maximize the capacity of judicial evaluation to supply much-needed guidance for law enforcement concerning the boundaries of permissible governmental activity in this critical area of the law.

1985) (discussing an insurance investigator who was on premises to determine the liability of the insurance company).